

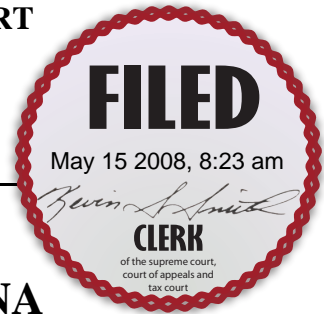
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**IN THE
COURT OF APPEALS OF INDIANA**

DONALD L. FRANKS,
Appellant-Defendant,

VS.

ANDRE TRUST,
Appellee-Plaintiff.

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No. 52A02-0711-CV-928

APPEAL FROM THE MIAMI CIRCUIT COURT
The Honorable Rosemary Higgins Burke, Judge
Cause No. 52C01-0603-MF-104

May 15, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Donald L. Franks appeals the trial court's judgment of forfeiture in favor of appellee-plaintiff Andre Trust (the Trust). Donald claims that the judgment regarding certain real property that he and his former spouse, Mary, had purchased from the Trust, was erroneous. More specifically, Donald contends that the trial court neglected to make several necessary findings and challenges a number of other findings regarding the payment of consideration, utility bills, and taxes on the property. Donald further maintains that the Trust's action should have been barred under the doctrine of laches, but claims that even if the remedy of forfeiture was appropriate, the trial court erred in also ordering him to pay an additional amount for damages. Concluding that the remedy of forfeiture was appropriate, and finding no other error, we affirm the judgment of the trial court.

FACTS

The Trust, which was established on August 29, 2000, owned approximately 6.5 acres of real estate in Miami County. On April 5, 2002, the Trust entered into a real estate installment contract with Donald and Mary Franks. Mary is the daughter of Florian and Darlene Andre, the settlors of the trust.

The contract stated that a mobile home was on the land and that the Frankses made a \$10,000 down payment at the signing of the contract. The total purchase price for the land was \$60,600, and the contract provided that the Frankses were to make monthly payments in the amount of \$702.78 at an interest rate of 4.4%. The contract also contained the following provisions regarding forfeiture or foreclosure:

If the purchasers shall fail to perform this contract or any part thereof, the Seller immediately after such default shall have the right to declare the same forfeited and void, and retain whatever may have been paid herein, and all improvements that may have been made upon the premises, together with additions and accretions thereto. . . .

. . .

If default is made by the Purchasers and such default continues for a period of thirty days or more, and the Seller desires to foreclose this contract in equity, then the Seller has at his option the right to declare the entire unpaid balance hereunder to be due and payable forthwith.

Appellant's App. p. 9. The contract also provided that the prevailing party could recover reasonable expenses, costs, and attorney fees.

The Frankses made two or three monthly payments toward the purchase price of the property, but no further payments were made after August 2002. However, after the contract was signed, Donald testified that he and Mary had a pole barn constructed on the property at a cost of between \$24,500 and \$30,000.

In October 2004, dissolution proceedings commenced between the Frankses and Donald vacated the residence. Mary was given temporary, exclusive possession of the real estate and was ordered to keep the payments current under the land contract. In January 2006, Mary moved to Nevada, and the property remained vacant. However, when Mary returned to the premises in April 2006, she discovered significant damage to the mobile home and pole barn. More specifically, the doors and walls had been broken, and several large appliances were missing and had been replaced with smaller ones. Additionally, a Jacuzzi, central air conditioning unit, light fixtures, and a water heater had been removed.

Darlene Andre paid the real estate taxes on the property in the amount of \$2219.02 to avoid a Sheriff's sale. She also paid maintenance and utility bills in the amount of \$1970.46.

On March 1, 2006, the Andre Trust filed a complaint against Donald and Mary to "Forfeit and/or Foreclose Upon Real Estate." Appellant's App. p. 2. The dissolution of the Frankses' marriage became final in August 2006. The dissolution court determined that the real estate was not a marital asset because of the pending foreclosure action.

A bench trial on the foreclosure action was conducted on June 15, 2007, and following the presentation of the evidence, the trial court entered its judgment, along with findings of fact and conclusions of law, on September 18, 2007. The trial court's findings provided as follows:

FINDINGS OF FACT

11. In October 2004, Donald and Mary filed for divorce in Howard County. Donald left the marital residence; however, Mary continued to reside there until January 2006 when she moved to Nevada. In that dissolution proceeding, Mary was given temporary, exclusive possession of the real estate and was ordered to keep current the payments under the land contract.

12. The final decree was entered in August 2006. The court found that since this real estate was involved in a foreclosure action, it did not constitute a marital asset of any value to divide or distribute in the dissolution action.

13. Darlene asserts that Donald caused the damage [to the property], but has not presented sufficient evidence to sustain her assertion.

14. Darlene has paid real estate taxes on the property to avoid Sheriff's sale. She has paid a total of \$2,219.02. She has also paid maintenance and utility bills totaling \$1970.46.

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17. Since neither Mary nor Donald have lived on the property, it has been subject to vandalism, the real estate taxes have not been paid, and utility bills have not been paid.

18. Mary did not attend the trial, or otherwise contest Plaintiff's Complaint. Mary did have knowledge of the trial, and notice of the date, time and place of the same.

CONCLUSIONS OF LAW

1. The land contract has been breached by Donald and Mary, in that they have failed to make any payments since August 2002 as required under the terms of the land contract.

2. The Court concludes that both Mary and Donald have abandoned the real estate.

3. The contract was in effect for less than six months before Donald and Mary defaulted in failing to make monthly payments as required.

4. The Court concludes that the contract buyers—Donald and Mary should be credited with the following payments upon the purchase price of \$60,600; \$10,000 down payment; and \$1,405.78, representing two monthly payments in the amount specified in the land contract, for a total of \$11,405.56. This represents less than 20% of the purchase price.

5. The court concludes that Donald and Mary have failed to keep and maintain the premises and buildings in as good condition as when originally purchased. As a result, the Trust will be required to either undertake significant repairs to restore the property, or take a significant loss in value if they sell it "as is."

6. The court concludes that the Trust has been further damaged in that it has not received anticipated interest payments totaling \$12,288.

7. The court further concludes that the Trust has been damaged by the necessity of paying taxes and utilities to maintain the property.

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10. In this case, Donald and Mary have made minimal payments on the contract. They have abandoned the property, and as a consequence, the property has been significantly damaged, leaving the Trust in a worse position than it was when the contract was executed. They have failed to pay taxes or utilities. Accordingly the court finds that judgment of forfeiture is appropriate.

ORDER

The land contract by and between the parties is hereby forfeited and terminated.

Mary C. Franks and Donald L. Franks no longer have any legal interest in or title to the real estate. . . .

The \$11,405.56 paid by the defendants to the Trust shall be considered liquidated damages as well as any improvements made upon the property.

Judgment is entered against Mary C. Franks and Donald L. Franks in the amount of \$2,219.02 for unpaid taxes, \$1970.46 for utility and maintenance expenses and \$1662.50 for attorney fees.

Id. at 10-12. Donald now appeals.

DISCUSSION AND DECISION

I. Standard of Review

When, as here, the trial court enters findings of fact and conclusions thereon sua sponte, the findings and judgment are not to be set aside unless clearly erroneous, and due regard is to be given to the trial court's ability to assess the credibility of the witnesses.

Piles v. Gosman, 851 N.E.2d 1009, 1012 (Ind. Ct. App. 2006). A judgment is clearly erroneous when there is no evidence supporting the findings or the findings fail to support the judgment or when the trial court applies the wrong legal standard to properly found facts. Id. Although findings of fact are reviewed under the clearly erroneous standard, we do not defer to conclusions of law, which are reviewed de novo. Id. To determine that a finding or conclusion is clearly erroneous, we must be left with the firm conviction that a mistake has been made. Id.

We also note that a trial court's sua sponte findings control only the issues they cover. Id. We will apply a general judgment standard to any issues about which the trial court did not make findings. Id. We will affirm a general judgment based on any legal theory supported by the evidence. Id.

II. Donald's Claims

A. Erroneous or Omitted Findings of Fact

Donald first contends that the judgment must be set aside because some findings were omitted from the judgment and others that the trial court specifically found were erroneous. Specifically, Donald claims that the trial court erroneously identified the time period regarding the passing of the deed and that no written finding was made regarding the consideration that was furnished to the Trust in support of the conveyance of the property. Moreover, Donald argues that the trial court's findings regarding the payment of real estate taxes and utility bill payments were erroneous and that the trial court erred in not making specific findings as to who paid for the mobile home or the installation of a septic system on the land.

Donald correctly asserts that “the trial court erroneously identified the time period between the deed from Donald and Mary Franks to the Andre Trust and the real estate contract here, as two years later.” Appellant’s Br. p. 7. Although the actual period of time was approximately six months, Donald fails to assert how this erroneous finding is relevant to the appeal. Moreover, the trial court subsequently noted in its “Conclusions of Law” that the contract “was in effect for less than six months” before Donald and Mary defaulted. Appellant’s App. p. 10. Thus, it is apparent that the trial court merely made a harmless scrivener’s error in its findings.

With regard to the payment of consideration, we note that Donald failed to assert this defense or make this argument at trial. Even more compelling, the warranty deed was admitted into evidence at trial, which provided that the consideration was “One (\$1.00) and other valuable consideration.” Id. at 193.

As for Donald’s claim that the trial court erred in finding that the Trust paid the real estate taxes, maintenance, and utility bills on the property, the evidence supported the trial court’s determination that the Trust made the payments or at least reimbursed Darlene Andre for the payments that she claimed she made. Specifically, the evidence established that Darlene and Florian were responsible for administering the trust and held the authority to “deal with any property” and “pay all expenses.” Id. at 139-45. At no time did Donald question the trustee’s authority to make payments on the Trust’s behalf. Thus, we cannot say that the trial court erred with regard to this finding. See Pitman v. Pitman, 721 N.E.2d 260, 263-64 (Ind. Ct. App. 1999) (observing that in reviewing the trial court’s findings of

fact and conclusions of law, we neither reweigh the evidence nor judge the credibility of the witnesses).

In a related argument, Donald contends that the land contract between the parties does not provide for the payment of “maintenance” or “utility bills.” Appellant’s Br. p. 9. Therefore, Donald contends that the payments made by the Trust with regard to those items should not have been awarded as a judgment against him. However, the land contract required the Frankses to “keep and maintain the premises and the buildings thereon in as good condition as they [were] . . . and not to commit waste. . . .” Appellant’s App. p. 197. Moreover, the contract provided that the prevailing party was entitled to recover reasonable “expenses, costs, and attorney fees.” Id. at 200. In our view, the trial court was permitted to consider the costs incurred by the Trust to maintain the property as “reasonable expenses” that flowed from the breach of contract. Therefore, Donald does not prevail on his claim that this portion of the judgment was erroneous.

Finally, with regard to Donald’s claim that the trial court should have credited him for the amount that he paid for the mobile home and septic system on the property, Darlene refuted Donald’s contention and testified that she paid for both. Id. at 72-74. Moreover, the title to the mobile home, which was introduced into evidence at trial, established that the mobile home was titled in Darlene’s name. Id. at 195. Furthermore, a receipt for the septic system in Darlene’s name that was dated February 9, 2002—almost two months prior to the execution of the land contract—was entered into evidence. Id. at 212. In essence, Donald has not directed us to any specific evidence in support of his alleged claim that he paid for the mobile home or the septic system. As a result, even though the trial

court did not make a specific finding with regard to these items, Donald's claim that he paid for the mobile home and septic system amounts to an invitation for us to reweigh the evidence, which we decline. See Pitman, 721 N.E.2d at 263-64.

B. Foreclosure vs. Forfeiture

Donald argues that the trial court erred in entering a judgment of forfeiture against him. More specifically, Donald argues that he paid more than a minimal amount towards the purchase price, that the evidence did not support a conclusion that he had abandoned the property, and that the Trust unreasonably delayed in enforcing the terms of the contract. As a result, Donald claims that "the facts . . . lead inexorably to the conclusion that forfeiture was not appropriate in [this] case." Appellant's Br. p. 13.

Recently, in Huber v. Sering, 867 N.E.2d 698, 704-05 (Ind. Ct. App. 2007), trans. denied, this court discussed the issue of whether forfeiture or foreclosure should be granted when a land contract is breached:

Forfeitures are generally disfavored by the law. In Skendzel v. Marshall, 261 Ind. 226, 301 N.E.2d 641 (1973), the Indiana Supreme Court emphasized that forfeiture is rarely as effective a remedy as foreclosure. However, the Skendzel court noted that forfeiture would be appropriate when a buyer has paid a minimal amount on the contract and seeks to retain possession when the seller is paying taxes, insurance and upkeep to preserve the premises. Skendzel, 261 Ind. at 241, 301 N.E.2d at 650. Under a typical conditional land contract, the vendor retains legal title until the total contract price is paid by the vendee. The court, in effect, views a conditional land contract as a sale with a security interest in the form of legal title reserved by the vendor. Conceptually, therefore, the retention of the title by the vendor is the same as reserving a lien or mortgage. Realistically, vendor-vendee should be viewed as mortgagee-mortgagor. To conceive of the relationship in different terms is to pay homage to form over substance. Skendzel, 301 N.E.2d at 646.

Judicial foreclosure of a land sale contract is in consonance with the notions of equity developed in American jurisprudence. A forfeiture—like a strict foreclosure at common law—is often offensive to American concepts of justice and inimical to the principles of equity. This is not to suggest that a forfeiture is an inappropriate remedy for the breach of all land contracts. In the case of an abandoning, absconding vendee, forfeiture is a logical and equitable remedy. Forfeiture would also be appropriate where the vendee has paid a minimal amount on the contract at the time of default and seeks to retain possession while the vendor is paying taxes, insurance, and other upkeep in order to preserve the premises. Forfeiture may only be appropriate under circumstances in which it is found to be consonant with notions of fairness and justice under the law.

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When faced with contract provisions calling for forfeiture of the portion of the purchase price paid prior to a buyer's default, the court must determine whether such provisions are enforceable as liquidated damage clauses or unenforceable as a[n] equitable forfeiture provision. In Skendzel, the court ultimately applied equitable principles comparing the amount paid by the buyers (\$21,000.00) to the total contract price (\$36,000.00) to conclude that forfeiture in that case would have been “inconsistent with generally accepted principles of fairness and equity.” Id. at 647. The result was a remand to the trial court for the sellers to proceed with a foreclosure of the contract rather than the forfeiture originally sought.

(Emphasis added). In Huber, the buyers had entered into a land contract with Sering, the seller. At the closing in February 2000, the Hubers promised to complete the down payment in April, but they failed to do so. The Hubers did, however, make a payment in June 2000—ten days after the deadline set forth in the contract. The Hubers also made a late payment in August 2000, but they did not pay the accrued late fees, assessments, or tax installments that became due on the property after the contract was signed. Id. at 702. The evidence also established that the Hubers breached several other agreements, including maintaining insurance and performing maintenance on the property. The trial court entered a judgment of forfeiture and found that the sums paid by the Hubers were

liquidated damages. We affirmed, observing that forfeiture was an appropriate remedy when the evidence demonstrated that the buyer abandoned the property, paid less than 20% of the purchase price, and the vendor paid the taxes and upkeep. Id. at 704-05.

In this case, the trial court concluded that “Donald and Mary have made minimal payments on the contract.” Appellant’s App. p. 11. As noted above, the evidence established that the Frankses made a \$10,000 down payment toward the purchase price of the property, and they made only two monthly payments as required under the land contract. Thus, the trial court’s determination that payment of only 20% of the purchase price supported the conclusion that only minimal payments toward the purchase price were made.

The trial court also made the specific finding that both Mary and Donald abandoned the property. Appellant’s App. p. 10. Although Donald argues that Mary alone had abandoned the property, both remained equally responsible under the terms of the contract. And, while Donald maintains that he should not be held responsible because Mary was awarded temporary possession of the marital residence during the divorce proceedings, the Trust was not a party to those proceedings.

More specifically, the evidence established that Mary left the residence in January 2006, and Donald testified that he knew she had vacated the premises. Id. at 94. Although Donald asserts that he was “prohibited from going on the property because Mary was awarded exclusive possession,” appellant’s br. p. 16, it is clear from the evidence that he had entered the premises before the final decree was entered. More specifically, Donald testified that he removed a refrigerator and stove that Darlene claimed were owned by the

Trust. Appellant's App. p. 32-34, 41-42, 129-30. Because the dissolution court had no jurisdiction to rule on issues regarding the provisions of the land contract, it does not matter who was awarded temporary possession of the real estate because both Donald and Mary signed that contract and both were equally and wholly responsible under its terms. Additionally, even though Donald may have been prohibited from entering the property pursuant to the dissolution court's order, he could have sought a modification of that order to secure or maintain the premises once Mary left. However, there is no evidence establishing that he did so. As a result, the property remained unoccupied and extensive damage occurred. Because Donald and Mary were equally responsible under the terms of the contract regarding the maintenance and upkeep of the property, it did not matter who damaged or failed to protect the property. Therefore, Donald's claim that the trial court erred in concluding that he had abandoned the property fails.

In sum, the evidence supported the trial court's findings that only a minimal amount of the purchase price had been paid, that the Trust paid the taxes and maintenance on the property, that Donald had abandoned the property, and that that extensive damage occurred to the residence after the property was abandoned. As a result, we conclude that the trial court's order of forfeiture against Donald was proper.

C. Laches

Notwithstanding our conclusion that forfeiture was an appropriate remedy in this case, Donald argues that the Trust's action seeking forfeiture should have been barred under the doctrine of laches. More specifically, Donald argues that forfeiture was not appropriate "given the family relationship between the parties to the contract, the free

exchange of money and title between them, and the unreasonable delay to enforce the contract by vendors.” Appellant’s Br. p. 5.

Donald correctly observes that the three elements that comprise the defense of laches are: 1) inexcusable delay in asserting a right; 2) implied waiver arising from a knowing acquiescence in existing conditions; and 3) circumstances causing prejudice to the adverse party. Bryant v. State, 405 N.E.2d 583, 585 (Ind. Ct. App. 1980). However, Donald only argues that he is entitled to a reversal on the basis of laches because of the Trust’s four-year delay in filing the action. In short, Donald does not argue that the delay prejudiced him or that the Trust somehow acquiesced in the failure to make the required payments under the land contract.

In Huber, we observed that the mere passage of time is insufficient to establish laches. 867 N.E.2d at 710. As a result, Donald’s claim that the trial court was precluded from entering judgment for the Trust on the basis of laches fails.

III. Damages and Forfeiture

Donald next claims that the trial court erred in ordering him to pay damages in addition to the forfeiture judgment. More specifically, Donald argues that because the Trust has recovered ownership of the real estate and was permitted to keep all payments that were made, “it is inequitable and unreasonable to enter an additional money judgment against the contract buyers.” Appellant’s Br. p. 19.

Contrary to Donald’s claim, he has not directed us to authority—and we have found none—that precludes a damage award in addition to a judgment of forfeiture. Rather, it has been held that damages awarded upon the breach of the land sale contract in excess of

foreclosure are not otherwise appropriate. Johnson v. Rutoskey, 472 N.E.2d 620, 626-27 (Ind. Ct. App. 1984). However, if the vendor receives less than what he is owed after the sale, he may have an additional claim for waste to cover the deficiency. Id.

In this case, the trial court specifically found, based on the evidence that was presented at trial, that

Donald and Mary have failed to keep and maintain the premises and building in as good condition as when originally purchased. As a result, the Trust will be required to either undertake significant repairs to restore the property, or take a significant loss in value if they sell it ‘as is.’

Appellant’s App. p. 10.

As discussed above, substantial damage resulted to the mobile home after Donald abandoned the premises. Moreover, several large appliances had been removed from the premises, and Donald admitted to being on the land after Mary vacated the residence. In essence, the trial court was attempting to make the Trust whole again and Donald has failed to show that the Trust was obtaining a windfall by ordering Donald to pay damages. Thus, under these circumstances, it was reasonable for the trial court to order Donald to pay damages that would compensate the Trust for its loss, notwithstanding the judgment of forfeiture.

The judgment of the trial court is affirmed.

NAJAM, J., and SHARPNACK, Sr.J., concur.